85-1607

Supreme Court, U.S.
FILED
MAR 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAURICE GIBBS,

Petitioner,

v.

JOHN T. KING, Secretary of the
Louisiana Department of Corrections, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STEPHEN G. TIPPS
Counsel of Record

R. PAUL YETTER
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

Attorneys for Petitioner

Questions Presented for Review

1. Does a state deprive a prisoner of his First Amendment right of free speech by prohibiting him from making "unwarranted or uncalled for remarks" to prison guards? May a federal court defer to the state's decision to do that, when the state never shows that the prohibition was enacted in the sincere and arguably correct belief that it would further a legitimate penological objective of the corrections system?

2. Does a state deprive a prisoner of his Fourteenth Amendment due process right to prior notice of what conduct is prohibited when it punishes him for "disrespect," the definition of which includes making "unwarranted and uncalled for remarks" to prison guards?

Parties to the Action

The other respondents are Fulton Rabalais, Alvin Whitstine, Joe Lee Norwood, Johnny Butler, Richard Alexander and Lee Slan, Jr. Each is a present or former employee of the Louisiana Department of Corrections.

TABLE OF CONTENTS

PAGE

Questions Presented for Review i

Parties to the Action ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Constitutional Provisions and Regulation Involved 2

STATEMENT OF THE CASE 3

The Facts 3

Proceedings Below 6

REASONS FOR GRANTING THE WRIT 7

I. There Is Conflict and Inconsistency In the Circuits 7

II. The Decision Below Is Erroneous and Will Have Important, Far-Reaching Consequences 10

Conclusion 12

Appendix A ..... Opinion of the Court Below

Appendix B ..... Judgment Below

Appendix C ..... Opinion of the Magistrate

TABLE OF AUTHORITIES

Cases	PAGE
Abdul Wali v. *Coughlin*, 754 F.2d 1015 (2d Cir. 1985) . .	9
Abdullah v. *Kinnison*, 769 F.2d 345 (6th Cir. 1985) . . .	8n.6
Brown v. *Johnson*, 743 F.2d 408 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 1190 (1985)	8
Grayned v. *City of Rockford*, 408 U.S. 104 (1972)	11
Hill v. *Blackwell*, 774 F.2d 338 (8th Cir. 1985)	8-9
Hurd v. *Williams*, 755 F.2d 306 (3rd Cir. 1985)	8n.5
Jones v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977)	10
Kolender v. *Lawson*, 461 U.S. 352 (1983)	11
Otey v. *Best*, 680 F.2d 1231 (8th Cir. 1982)	9n.7
Pell v. *Procunier*, 417 U.S. 817 (1974)	7-8
Procunier v. *Martinez*, 416 U.S. 396 (1974)	7-8
Safley v. *Turner*, 777 F.2d 1307 (8th Cir. 1985)	9n.7
St. Claire v. *Cuyler*, 634 F.2d 109 (3rd Cir. 1980)	8n.5
Sands v. *Wainwright*, 357 F. Supp. 1062 (MD. Fla.), *vacated on other grounds*, 491 F.2d 417 (5th Cir. 1973), *cert. denied*, 416 U.S. 992 (1974) . .	11n.8
Shabazz v. *O'Lone*, 782 F.2d 416 (3rd Cir. 1986)	8
Ustrak v. *Fairman*, 781 F.2d 573 (7th Cir. 1986)	9
Wolff v. *McDonnell*, 418 U.S. 539 (1974)	7
Statutes & Rules	
29 U.S.C. § 1254(1)	2
42 U.S.C. § 1983	3
Fed. R. Civ. P. 41(b)	6
La. Dept. of Corrections R. & Pro. for Adult Prisoners	7 passim
Constitutional Provisions	
U.S. Const. Amend. I	2
U.S. Const. Amend. XIV	2
Miscellaneous	
Note, *Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts*, 26 Stan. L. Rev. 855 (1974)	11n.8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. _____

MAURICE GIBBS,

Petitioner,

v.

JOHN T. KING, Secretary of the
Louisiana Department of Corrections, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Maurice Gibbs asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 2, 1986.

Opinions Below

The opinion of the Court of Appeals is reported at 779 F.2d 1040 and reprinted as Appendix A. The judgment of the Court of Appeals is reprinted as Appendix B. The opinion of the District Court for the Middle District of Louisiana, read into the trial record by the Magistrate, is not reported and is reprinted as Appendix C. References in this petition to the opinions below will be cited to the consecutively-numbered Appendixes.

Jurisdiction

The judgment of the Court of Appeals was entered on January 2, 1986. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Regulation Involved

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Rule 7 of the Disciplinary Rules and Procedures for Adult Prisoners of the Louisiana Department of Corrections provides:

> *Disrespect:* No prisoner shall make or write derogatory or degrading remarks about an employee. Employees shall not be subjected to insults, unwarranted and uncalled for remarks, or other clearly intrusive verbal behavior when in the performance of their proper duties. Employees shall not be subject to unsolicited, non-threatening, abusive conversation, correspondence, or phone calls. Prisoners shall address employees by proper title or by 'Mr.', 'Ms.', 'Miss', or 'Mrs.' whichever is appropriate. No prisoner shall curse an employee in his absence.

STATEMENT OF THE CASE

This case involves a state prison regulation which prohibits "disrespect" by inmates to guards, including "unwarranted and uncalled for remarks." Petitioner brought a *pro se* section 1983 civil rights action against certain state prison officers and guards, claiming that the rule abridges his freedom of speech, that on its face it does not give fair notice of the conduct it proscribes and that he had no prior warning that statements he made would warrant punishment. On respondents' motion, the trial judge dismissed the suit at the close of petitioner's case. Respondents therefore put on no evidence and made no showing of why the restriction was instituted or whether it furthers its intended purpose. Nevertheless, on appeal the Fifth Circuit affirmed the dismissal of those claims.

The Facts

Petitioner Maurice Gibbs is an inmate of the Louisiana State Penitentiary. In 1981, he was accused and found guilty of twice violating Rule 7 of the Louisiana Department of Corrections Disciplinary Rules and Procedures for Adult Prisoners. Specifically, a prison disciplinary board determined that on November 16 Gibbs had shown "disrespect" in making certain statements to respondent Lee Slan, Jr., a prison guard. The then Secretary of the Department, respondent John T. King, later upheld that finding. For each violation, Gibbs was sentenced to five days in isolation, suspended to ninety days.[1]

Gibbs' first "disrespectful" statement, paraphrased from Slan's disciplinary report by the court below (A. 4), occurred "when Slan was telling the inmates on Gibbs' tier to hold down the noise, [and] Gibbs hollered out of his cell that Slan should hold down the noise because he was the only one making noise." At trial, Slan explained why that violated Rule 7. It was not because Gibbs replied to Slan's command or that he hollered from out of his cell; rather, it was just because Gibbs was "disrespectful" in

---

[1] The court below found that the punishments deprived Gibbs of his state-created liberty interests. (A. 6-7)

saying to Slan, "[Y]ou're the only one making noise." Respondent Fulton Rabalais, a prison officer, also testified about these statements. He said that he would consider "that type of remark" to a prison guard, on a tier with maybe twelve or fourteen other inmates, to be an "uncalled for remark."

The second "disrespectful" statement later the same day, again in the words of the court below (A. 4), was when "Gibbs, while on his way to the shower, asked Slan if he had a problem. When Slan replied that he did not, Gibbs stated that he would have one soon." Slan's testimony about why he thought these statements were "uncalled for" is instructive:

> Q. What did you find disrespectful about those statements?
>
> A. Uncalled for.
>
> Q. It was uncalled for.
>
> How did you know it was uncalled for?
>
> A. When I let you out on the tier for your hour, to go in the shower, [there] wasn't any talk.
>
> You were the only one talking.
>
> Q. You say a prisoner shouldn't talk?
>
> A. I didn't say that.
>
> * * *
>
> Q. Well, how do statements become uncalled for?
>
> A. By asking me did I have a problem —
>
> Q. Right.
>
> A. And that if I didn't have one, I would have one very soon.
>
> * * *
>
> Q. When does a remark become uncalled for — unwarranted?
>
> A. As you know, I had to call it.
>
> * * *

It was uncalled for as to the problem which you brought up when you came to the head of the tier to take your shower.

You didn't have to say anything to me.

Q. You felt I shouldn't have said anything to you?

A. Not about, I'm going to have a problem. If I didn't have one, I would have one soon.

Q. That wasn't my statement.

My statement is: When does a remark a prisoner makes become unwarranted or uncalled for?

That is the statement I asked you.

You never answered that question.

A. Unwarranted and uncalled for?

Q. Right.

When does it become unwarranted and uncalled for?

A. That was uncalled for there.

Q. How was it uncalled for?

A. By asking me what you asked.

Q. Well, is an uncalled for remark defined in the rule book?

A. It is.

Q. Do[es] the rule book stat[e] what an uncalled for and an unwarranted remark is?

A. I think it do[es].

Rabalais concurred that Gibbs' statements were "uncalled for" and to him would be "very near" a threat.

More generally, Rabalais testified that "unwarranted remarks" under Rule 7 "could vary" and be a "number of things." And "uncalled for remarks" "would depend on the situation. A lot of different remarks could be uncalled for, given a certain situation.

. . . It wouldn't necessarily have to be a confrontation situation. It would depend on the area that it's in."

Besides Slan and Rabalais, whom Gibbs called as adverse witnesses, no other prison representative testified at trial about the operation or purpose of Rule 7.

Proceedings Below

At the close of Gibbs' case, which was tried to a United States Magistrate, respondents moved for involuntary dismissal under Fed. R. Civ. P. 41(b). The trial judge granted the motion, holding that Rule 7 is not unconstitutionally vague, because it "outlines a readily ascertainable standard" and "cannot be much more precise than it is." (A. 17) The court did not pass on whether the restriction impaired Gibbs' First Amendment rights.

In affirming, the Court of Appeals expressly found that Rule 7 did not impermissibly restrict Louisiana prisoners' freedom of expression. It considered the limitation to be a sensible response to a concern about the "escalation of tension that can arise from gratuitous exchanges between inmates and guards and [the ability of] employees to maintain order without suffering verbal challenges to their authority." (A. 9) The court also found that Rule 7 provides reasonable and fair notice, since the term "unwarranted and uncalled for remarks" is modified by "clearly intrusive," since the statements must be made to a prison employee in the performance of his duties and since the rule operates in the unique context of a prison. (A. 9-10) Lastly, the court held that Rule 7 was properly applied to Gibbs: his statement that Slan was making all the noise could have interfered with Slan's duty to maintain order; and Gibbs' statement that Slan would have a problem soon was almost a threat. (A. 10)

REASONS FOR GRANT THE WRIT

This case raises important questions about what rights a state prisoner enjoys to free speech, under the First Amendment, and to prior notice of prohibited conduct, under the Fourteenth Amendment. It also presents the issue of whether the state has any burden to produce evidence of the purpose and operation of its restrictions on inmates' constitutional rights before a federal court should defer to the expertise of the prison administrators. The conclusions of the court below directly conflict with those of courts in other circuits, creating a situation in which prisoners in the various circuits will enjoy substantively different rights and privileges. The lower court's countenancing of the dismissal of petitioner's civil rights claims before the state even presented its evidence also harks back ominously to the day when federal courts maintained a hands-off attitude towards problems of prison administration.

I.

THERE IS CONFLICT AND INCONSISTENCY IN THE CIRCUITS.

In *Wolff*,[2] *Pell*[3] and *Martinez*,[4] this Court firmly settled several questions about the civil rights of inmates. "There is no iron curtain drawn between the Constitution and the prisons of this country," *Wolff*, 418 U.S. at 555-56, and "[a] prisoner does not shed ... basic First Amendment rights at the prison gate." *Martinez*, 416 U.S. at 423 (Marshall, J., concurring). Rather, prisoners retain "those First Amendment rights which are not inconsistent with [their] status as ... prisoner[s] or with the legitimate penological objectives of the corrections system." *Pell*, 417 U.S. at 822. And the courts must enforce those rights: "When a prison regulation or practice offends a fundamental

---

[2] *Wolff* v. *McDonnell*, 418 U.S. 539 (1974).

[3] *Pell* v. *Procunier*, 417 U.S. 817 (1974).

[4] *Procunier* v. *Martinez*, 416 U.S. 396 (1974).

constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Martinez*, 416 U.S. at 405.

However, the Court has yet to articulate fully the breadth and character of a prisoner's right of free speech, beyond stating that "challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system." *Pell*, 417 U.S. at 822. As a result, a fundamental conflict now exists in the circuits on that basic aspect of a prisoner's constitutional rights.

With no support in the record, the Fifth Circuit concluded below that Rule 7 had legitimate purposes and that it was a reasonable means of achieving those aims. This utter deference to the decisions of prison administrators, to the point of requiring no showing of why a challenged prison regulation was enacted or whether it in any way furthers its original objectives, is directly contrary to approaches expressly adopted for prisoner First Amendment cases in the Third, Sixth and Eighth Circuits. *See Shabazz* v. *O'Lone*, 782 F.2d 416, 420 (3rd Cir. 1986) ("the state must show that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that no reasonable method exists by which [the prisioner's First Amendment] rights can be accommodated without creating bona fide security problems");[5] *Brown* v. *Johnson*, 743 F.2d 408, 412-13 (6th Cir. 1984) (the court will defer to the judgment of the prision administrators "[a]s long as [the] prison authorities present evidence to support their judgment that prision security will be undermined in the absence of [the] challenged regulation"), *cert. denied*, 105 S. Ct. 1190 (1985);[6] *Hill* v. *Blackwell*, 774 F.2d 338, 342-43 (8th Cir. 1985) (the court will defer to the

---

[5] *Shabazz* adds to the requirement in that circuit announced in *St. Claire* v. *Cuyler*, 634 F.2d 109, 114 (3rd Cir. 1980), that the state must "produce evidence that to permit the exercise of first amendment rights would create a potential danger to institutional security. This evidence may consist of expert testimony from the responsible officials, provided they testify to opinions that are 'held 'sincerely' and [are] arguably correct.' " *Accord Hurd* v. *Williams*, 755 F.2d 306, 308 (3rd Cir. 1985).

[6] *Accord Abdullah* v. *Kinnison*, 769 F.2d 345, 350 (6th Cir. 1985).

prison officials' judgment if the responsible officials show that "the exercise of the challenged [First Amendment right] could create a potential threat to a legitimate penological objective").[7] *Cf. Abdul Wali* v. *Coughlin*, 754 F.2d 1015, 1033 (2d Cir. 1985) (where the prohibited First Amendment activity is not presumptively dangerous, "it is incumbent upon prison officials to show that a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restriction are no greater than necessary to effectuate the governmental objective involved"). On the other hand, the Seventh Circuit seems to have adopted an approach similar to that of the court below. *See Ustrak* v. *Fairman*, 781 F.2d 573, 580 (7th Cir. 1986) (upholding a regulation that forbids inmates' "being disrespectful to any [prison] employee" or using "improper language" toward any other inmate or prison employee, since the regulation bears a "direct and elementary relation to the needs of prison administration").

The import of these disparate analyses is clear: In some circuits, prisoners are assured that rules which infringe their First Amendment rights will not stand scrutiny unless their limitations were imposed in the honest and probably correct belief that they would further a legitimate prison objective, and in fact they do so. In others, now including the Fifth Circuit, identical prison restrictions will come before the federal bench with an almost irrebutable presumption of propriety, no matter what their original object or actual operation may be. Certiorari should be granted in this case so that the Court may squarely address the precise scope of a prisoner's right of free speech and the proper standard of review of a state's abridgement of that right.

---

[7] *Hill* follows *Otey* v. *Best*, 680 F.2d 1231, 1233 (8th Cir. 1982), which, in turn, adopts the standard articulated in *St. Claire*, *supra* note 5. *Cf. Safley* v. *Turner*, 777 F.2d 1307, 1313 (8th Cir. 1985) (applying a "strict scrutiny" standard to prison prohibitions of the exercise by inmates of First Amendment rights, where the activity is not presumptively dangerous nor inherently inconsistent with legitimate penological objectives).

II

THE DECISION BELOW IS ERRONEOUS AND WILL HAVE IMPORTANT, FAR-REACHING CONSEQUENCES.

The decision of the Court of Appeals should be reviewed by this Court because it is erroneous and, more significantly, because it sanctions lower federal courts impermissibly abrogating their responsibility to protect constitutional rights. It also will encourage prisons to promulgate vaguely-worded regulations to prohibit unnecessarily and improperly an entire facet of inmate speech, what the court below denominated "gratuitous exchanges between inmates and guards."

The Fifth Circuit erred in adopting an approach different from those set out above in the Second, Third, Sixth and Eighth Circuits. Those courts carefully followed this Court's holdings, particularly *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), in arriving at those standards. In *Jones*, the Court indicated that it contemplated some showing of the state prison officials' good faith intentions in promulgating a challenged regulation. It pointed out that there the district court had concluded from their testimony that the North Carolina officials' beliefs — that an inmates' union was fraught with danger — "were held 'sincerely' and were arguably correct," and therefore the officials "needed to show [no] more." *Id.* at 122-23. Clearly, the Court considered this "showing" of the "informed discretion of prison officials that there is potential danger," *id.* at 133 n.9, a requisite to a federal court's deference to the decisions of the state administrators. Thus, considering this Court's pronouncements on the issue, the court below adopted an erroneously deferential standard, one that requires no showing by the state officers, for considering First Amendment challenges to prison regulations.

The court below also wrongly concluded that the language of Rule 7 imparts fair notice of its prohibitions. No inmate of ordinary intelligence can possibly know what statements a particular prison guard and disciplinary board will consider to be punishable "disrespect" or "unwarranted and uncalled for remarks," as he must be able to know. *Grayned v. City of*

Rockford, 408 U.S. 104, 108 (1972). Moreover, the rule establishes no standard for enforcement, as it must. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Rather, as Slan conceded at trial, "I [the prison guard] had to call it." Considering the special value of clearly-defined regulations in a prison setting,[8] that holding of the Court of Appeals was error.

Beyond that, the Fifth Circuit takes two disturbing and long steps in the direction of the discredited hands-off approach. It first accepts the proposition that the parameters of conduct and speech regulations need not be explicit if the rule is used in a prison. Second, and more critically, the court seems willing to disregard what prison administrators actually intended to achieve in enacting right-prohibiting prison rules. In lieu of the true (and possibly improper) reasons underlying a challenged rule, the court below substitutes its own conception of the legitimate objectives that the regulation arguably might further. Judging from that *post hoc* perspective, then, the court readily will reject the challenge. Obviously, these approaches will make consideration of most, if not all, objections to state restrictions on due process or First Amendment rights of prisoners a summary matter, in arriving at virtually a predetermined result. This Court's prior prisoner rights cases, and the constitutional guarantees on which they are premised, simply do not allow such an approach.

---

[8] *See Sands v. Wainwright*, 357 F. Supp. 1062, 1091 (M.D. Fla.) ("clear rules may tend to decrease dissatisfaction with the disciplinary processes to such an extent that litigation may decrease"), *vacated on other grounds*, 491 F.2d 417 (5th Cir. 1973), *cert. denied*, 416 U.S. 992 (1974); Note, *Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts*, 26 Stan. L. Rev. 855, 865 n.53, 866 (1974) (the need for fair warning is perhaps strongest in a prison, where inmate life is highly regulated and prisoners thus are more likely than most persons to inform themselves of institutional guides to conduct; the need for clear standards for enforcement is also greater than in other contexts, considering the antagonistic relationship between the parties that increases the potential for arbitrary and discriminatory enforcement).

Conclusion

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

STEPHEN G. TIPPS *(Counsel of Record)*

R. PAUL YETTER
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

Attorneys for Petitioner

Certificate of Service

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was sent by United States mail, first-class postage prepaid, to the following counsel of record for Respondents, John T. King, et al., on this 28th day of March, 1986:

JOSEPH ERWIN KOPSA
1885 Wooddale Boulevard
Suite 1218
Baton Rouge, LA 70806-1590

STEPHEN G. TIPPS

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAURICE GIBBS,
Plaintiff-Appellant,

v.

JOHN T. KING, Secretary, Department of Corrections, ET AL.,
Defendants-Appellees.

No. 84-3232

OPINION

Filed January 2, 1986

Before: Reynaldo G. Garza, Henry A. Politz, and Robert M. Hill, Circuit Judges.

Opinion by Judge Robert M. Hill

Appeal from the United States District Court
for the Middle District of Louisiana
John B. Noland, Magistrate, Presiding

SUMMARY

Prisons and Jails

Appeal from an involuntary dismissal of a 42 U.S.C. § 1983 action under Federal Rule of Civil Procedure 41(b). Affirmed in part and reversed in part.

A Louisiana state prisoner brought an action under § 1983 based on decisions of disciplinary officers and boards finding him guilty of disobedience and disrespect on various occasions, and the imposition of penalties ranging from loss of store privileges to a suspended sentence of isolation. He was also charged with violation of a posted rule prohibiting him from storing anything under his mattress, but he argued that he didn't know about the rule, and that it was not posted. In trial before a magistrate, the magistrate found

that appellant was not a credible witness and granted a defense motion for involuntary dismissal.

[1] Appellant is not afforded an interest in not being subject to conditions which are within the terms of confinement ordinarily contemplated by a prison sentence by the Due Process Clause itself, but the state of Louisiana has created such an interest in the rules to guide prison discipline promulgated by the Department of Corrections, **[2]** and these rules gave appellant a right to due process protection. **[3]** Although the board was not required to accept unsworn statements of witnesses for the appellant, **[4]** the dismissal of appellant's claim regarding whether the mattress policy was posted must be reversed and remanded for a determination by the magistrate as to whether the decision is supported by "some facts," or by "any evidence at all," and if not, appellant is entitled to appropriate relief.

[5] Appellant's challenge to Disciplinary Rule 7 (which forbids disrespect to employees) on First Amendment and Due Process grounds fails because the rule does not impermissibly inhibit prisoners' freedom of expression, **[6]** and provides reasonable and fair notice.

[7] Prison officials are prohibited from retaliation against inmates who complain of prison conditions or official misconduct, but **[8]** the magistrate in this case made findings sufficient to support his dismissal of appellant's harrassment claim, finding the appellant's testimony lacked credibility. **[9]** It was not an abuse of discretion for the magistrate to refuse to subpoena the secretary of the state Department of Corrections.

OPINION

ROBERT M. HILL, Circuit Judge:

Maurice Gibbs, a prisoner incarcerated in the Louisiana State Penitentiary, brought suit under 42 U.S.C. § 1983 against John King, Secretary of the Louisiana Department of Corrections; Fulton Rabalais, Alvin Whitstine, Joe Lee Norwood, and Johnny But-

ler, all supervisory employees at the penitentiary; and Richard Alexander and Lee Slan, both prison guards. In a trial before the magistrate, at the close of Gibbs' case the magistrate granted defendants' motion for involuntary dismissal under Fed. R. Civ. P. 41(b). Gibbs appeals. We affirm in part and reverse in part.

At trial, Gibbs testified that his troubles with appellees began on September 24 or 25, 1981, when he asked prison guard Slan for some toothpaste and salt. When Slan refused, Gibbs said he would write a complaint to the Department of Corrections. Slan responded that he could play the same game and could write Gibbs up too.

On October 6 Gibbs sent a letter to the Secretary of the Department of Corrections, with a copy to appellee Norwood. He complained among other things that Slan had threatened retaliation if he filed a complaint, and that Slan and prison guard Alexander had damaged his typewriter during a scrub-down on September 27. Gibbs received no response to this complaint, and no corrections officials ever discussed it with Slan.

On November 12 Gibbs was written up by Alexander for "Disobedience." The disciplinary report charged Gibbs with having mail and a jump suit under his mattress in violation of prison rules.

At a disciplinary hearing before a disciplinary officer, the prisoner may not present any evidence other than his own word, and the disciplinary officer may impose only a minor penalty. Supervisor Butler, who heard the disciplinary charge, thus refused to allow Gibbs to present affidavits in his defense and found Gibbs guilty "based on [the] credibility of [the prison] officer's statements." Butler sentenced Gibbs to a two-week loss of store privileges.

Gibbs then appealed to a disciplinary board that was comprised of appellees Rabalais and Whitstine. On appeal, Gibbs was entitled to a de novo hearing, including, among other things, the rights to notice, to present evidence and witnesses, and to a written summary of the reasons for the board's decision. Gibbs contended before the disciplinary board that the charge was untrue, and he attempted to present a statement signed by two prisoners to sup-

port his defense. Because the statement was not sworn, Rabalais refused to consider it. Gibbs also contended that the policy prohibiting storage of items under mattresses was never posted. He asked to call another prison official to see if the policy had been posted but his request was refused. The board found Gibbs guilty and upheld Butler's sentence on the basis of Alexander's credibility.[1]

Gibbs repeated at the trial before the magistrate his contentions that he did not violate the mattress policy. Finding that the board's decision was supported by "some evidence," the magistrate upheld the board's finding of guilt. Second, Gibbs argued that prison rules required policies to be posted before prisoners could be charged with violating them and that the mattress policy was not posted. The magistrate made no factual findings regarding this issue. Third, Gibbs argued that the board should have considered the unsworn statements. The magistrate rejected this argument finding that the disciplinary board looked at the statements and properly could have rejected them either because they were not sworn or because they were not credible.

On November 16, Gibbs received two more disciplinaries, both from Slan. The first charged that when Slan was telling the inmates on Gibbs' tier to hold down the noise, Gibbs hollered out of his cell that Slan should hold down the noise because he was the only one making noise. The second charged that Gibbs, while on his way to the shower asked Slan if he had a problem. When Slan replied that he did not, Gibbs stated that he would have one soon. Gibbs was found guilty on both reports for "disrespect" under Rule 7 of the Disciplinary Rules and Procedures for Adult Prisoners of the Louisiana Department of Corrections.

These November 16 "Disrespect" charges were heard by a disciplinary board. Gibbs challenged the accuracy of only the second of the two November 16 reports. He testified that when he went to the shower, Slan told him that he had a problem and that Slan would change his attitude. Gibbs replied that Slan had the problem, and Slan said that Gibbs would have one soon. When Gibbs got out of the shower, Alexander gave him the disciplinary and said Slan had

[1]The disciplinary board's decision was not appealable to Secretary King because there was no serious penalty involved.

sent it. Gibbs was found guilty "based on [his] own statements and [the] credibility of [the disciplinary] report and of officer [Slan's] statements" on the report and sentenced for both violations to five days in Isolation, suspended to ninety days.[2]

Secretary King denied appeal. In response to Gibbs' claim that Disciplinary Rule 7 was unconstitutional, he stated that "[i]t adequately describes unacceptable conduct so that the inmate is put on notice as to when he may be subject to punishment." The magistrate affirmed.

Finally, on November 21 Alexander wrote up Gibbs for "Disobedience Aggravated." Alexander stated that he gave Gibbs several direct verbal orders to stop hollering down the tier, but that Gibbs refused to obey.

This charge was heard by a disciplinary board. Gibbs testified that Alexander conducted a shakedown in his cell and began throwing Gibbs' property around. When Gibbs said he would complain to a supervisor, Alexander wrote up a disciplinary report saying that Gibbs had "hollered down the tier." Gibbs was found guilty "based on [the] credibility of [the] officer's statements." He was sentenced to five days in Isolation, suspended to ninety days. Secretary King denied appeal of this conviction and the magistrate affirmed.

In addition to the foregoing, Gibbs attempted to introduce testimony at trial designed to show that King and Norwood had failed properly to supervise department employees. This evidence would have included testimony of another inmate that he had complained about Slan. The magistrate refused to permit this testimony, stating that he would not permit Gibbs "to expand the pleadings."

On Gibbs' claim of harassment, the magistrate stated that the applicable standard was whether the disciplinary board's actions

[2]A report for which a suspended sentence is given will be removed from an inmate's record if he receives no other reports during the period of suspension. If the prisoner receives another report within the ninety days he may be required to serve the suspended sentence in addition to any new sentences which may be imposed.

were arbitrary and capricious or an abuse of discretion. He noted that he did not find Gibbs to be a credible witness, and found that the board could reasonably have found the prison guard Alexander to be more credible than Gibbs.

Gibbs argues on appeal that the magistrate erred in dismissing his four claims: (1) that he had been denied due process, (2) that Disciplinary Rule 7 is unconstitutionally vague and overbroad, (3) that appellees had retaliated against him for his filing of an administrative complaint, and (4) that the magistrate erred in refusing to allow him to present evidence on his claim of supervisory liability and in refusing to subpoena appellee King.

I.

In this appeal Gibbs makes several due process challenges to his convictions. He contends that appellees violated his rights by refusing to allow him to present evidence in his own behalf, by failing to post the mattress policy, and by finding him guilty without adequate evidence.

[1] Appellees appear to argue that Gibbs has no protected interest in not being deprived of store privileges and in not having a suspended sentence imposed. The Supreme Court has held that the Due Process Clause itself does not afford inmates an interest in not being subject to conditions which are within the terms of confinement ordinarily contemplated by a prison sentence. But if there is a state-created liberty interest, violation of that interest can call into application constitutional due process protections. *Hewitt v. Helms*, 459 U.S. 460, 466-69 (1983); *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976). We have recently recognized that Louisiana has created such an interest. It is found in the rules to guide prison discipline promulgated by the Department of Corrections. *McCrae v. Hankins*, 720 F.2d 863, 868 (5th Cir. 1983). In *McCrae*, this court found that the substantive limitations placed on the discretion of prison officials by particularized standards or criteria served to create the liberty interest. 720 F.2d at 867. "[T]he creation of procedural guidelines to channel the decision-making of prison officials" without more does not create a protected liberty interest, but "requiring that certain procedures 'shall,' 'will,' or 'must' be employed" creates a liberty interest. *Hewitt v. Helms*, 459 U.S. at

471-72. Where regulations place substantive limitations on official discretion, a state-created liberty interest exists. *McCrae*, 720 F.2d at 868; *Lewis v. Thigpen*, 767 F.2d 252, 261-62 (5th Cir. 1985).

[2] Under *McCrae's* reasoning, Gibbs had a right to due process protection. The Disciplinary Rules and Procedures state, "No prisoner may be punished except after a finding of guilt by the Disciplinary Officer or Disciplinary Board, and then only according to the penalty schedule for that violation." The remaining question is what process was due.

An inmate is entitled to prior notice, or "fair warning," of proscribed conduct before a severe sanction may be imposed.[3] *Adams v. Gunnell*, 729 F.2d 362, 369 (5th Cir. 1984); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1352 (S.D. Tex. 1980), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir.), *opinion amended in part and vacated in part*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042 (1983); *see Grayned v. City of Rockford*, 408 U.S. 104 (1972). As to the hearing itself, it is not yet clear what procedures are required. At the least, there must be notice of the charge and some opportunity to be heard. *Hewitt*, 459 U.S. at 472; *McCrae*, 720 F.2d at 868. There may be a qualified right to call witnesses and present documentary evidence. *Wolff v. McDonnell*, 418 U.S. 539, 566 (1976), but the process due may decrease as the severity of the punishment decreases. *Baxter v. Palmigiano*, 425 U.S. 308, 323-24 (1976); *Wolff*, 418 U.S. at 572 n.19. Within these limits the federal policy is to afford wide discretion to prison officials. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *Stewart v. Thigpen*, 730 F.2d 1002, 1005 (5th Cir. 1984). Federal courts will not review the sufficiency of the evidence at a disciplinary hearing; a finding of guilt requires only the support of "some facts" or "any evidence at all." *Stewart*, 730 F.2d at 1005-06; *McCrae*, 720 F.2d at 868; *Smith v. Rabalais*, 659 F.2d 539, 545 (5th Cir. 1981), *cert. denied*, 455 U.S. 992 (1982).

[3] In the mattress case, Gibbs was not permitted to present evidence during the initial hearing before the disciplinary officer. Even assuming that Gibbs had a due process right to present evidence

[3]This court has not yet decided what constitutional rights to prior notice a prisoner enjoys (absent a state created right to notice) where only minor sanctions are involved.

other than his own testimony, appellees did not violate it. Although he could not present evidence in the hearing before Butler, he received a de novo hearing before the board. Gibbs does not dispute that the statement of other inmates he presented to Rabalais was unsworn. The board in its discretion could refuse to consider the statement on that ground. *See Smith*, 659 F.2d at 545 (citing *Baxter*, 425 U.S. at 322); *Thomas v. Estelle*, 603 F.2d 488, 490 (5th Cir. 1979). There was also sufficient evidence to support the board's findings based upon credibility choices.

[4] In one respect, however, the disciplinary board's decision may lack validity. The board found Gibbs' violation of the mattress policy to be in violation of Disciplinary Rule 4 which states in pertinent part: "Prisoners must obey the approved Posted Policies of the facility in which they are confined." Notice through posting is an element of the offense charged and is central to a finding of guilt. Nevertheless, the board apparently heard no evidence contradicting Gibbs' testimony that the mattress policy was unposted and made no finding of fact with respect to that issue. The magistrate as well made no finding on this issue. Accordingly, we are compelled to reverse the dismissal of this claim and remand for a determination by the magistrate as to "whether at least the [board's] decision is supported by 'some facts'—'whether any evidence at all' supports the action taken by the prison officials." *Smith v. Rabalais*, 659 F.2d at 545, (quoting *Willis v. Ciccone*, 506 F.2d 1011, 1018 (8th Cir. 1974)).[4] If not, then Gibbs is entitled to appropriate relief.[5]

II.

Gibbs challenges the constitutionality of Disciplinary Rule 7 on First Amendment and due process grounds. Rule 7 provides:

[4]In making this determination the court should be aware that it is not necessary to retry this disciplinary dispute since a de novo review of the disciplinary board's decision is not required. *Smith v. Rabalais*, 659 F.2d at 545. Where the record before the board or other documentary evidence substantiates its finding, this would obviate the need for a hearing on the issue. *Willis v. Ciccone*, 506 F.2d at 1019.

[5]We note that even if the defendants are immune from an award of damages, Gibbs, at minimum, is entitled to have the offense stricken from his record.

> No prisoner shall make or write derogatory or degrading remarks about an employee. Employees shall not be subjected to insults, unwarranted and uncalled for remarks, or other clearly intrusive verbal behavior when in the performance of their proper duties. Employees shall not be subject to unsolicited, non-threatening, abusive conversation, correspondence, or phone calls. Prisoners shall address employees by proper title or by "Mr.," "Ms.," "Miss," or "Mrs." whichever is appropriate. No prisoner shall curse an employee in his absence.

Gibbs asks for damages and for an injunction requiring appellees to modify Rule 7. He thus appears to be challenging the rule both on its face and as it was applied to him in the two November 16 disciplinaries.

When a prison regulation is alleged to infringe upon First Amendment interests, it "must further 'one or more of the substantial government interests of security, order, and rehabilitation.' " *Adams*, 729 F.2d at 367 (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)). A federal court will defer "to the professional judgment of prison officials 'in the absence of substantial evidence . . . that the officials have exaggerated their response to these considerations.' " *Adams*, 729 F.2d at 367 (quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977)); *Pell*, 417 U.S. at 827.

[5] We find that Rule 7 does not impermissibly inhibit prisoners' freedom of expression. Its clear purposes are to prevent the escalation of tension that can arise from gratuitous exchanges between inmates and guards and to enable employees to maintain order without suffering verbal challenges to their authority. Rule 7 is a reasonable and sensible response to that concern.

[6] Gibbs also complains that Rule 7 does not provide "fair warning" of the conduct that is proscribed. We find that Rule 7 provides reasonable and fair notice. Gibbs argues that it could apply to entirely innocent remarks and that it provides no guidelines for determining what remarks are unwarranted. In fact, however, the rule employs the term "clearly intrusive" to modify "unwarranted and uncalled for remarks," and requires that such a remark be

made to an employee "in the performance of [his] proper duties." While these terms are general in nature, in light of the setting of the prison milieu and the need for control and discipline we find them clearly adequate for their purpose. In the particular context, the rule was properly applied. The statement by Gibbs to Slan that Slan was making all the noise was unwarranted in that it could have interfered with Slan's duty to maintain order. His statement that Slan "would have a problem soon" bordered on a threat. Rule 7 provided adequate notice that these statements were improper.

III.

[7] Gibbs also argues that the magistrate erred in rejecting his harassment claim. The law is well established that prison officials may not retaliate against or harass an inmate because of the inmate's exercise of his right of access to the courts. *Ruiz v. Estelle*, 679 F.2d 1115, 1153 (5th Cir.), *opinion amended in part and vacated in part*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042 (1983); *Campbell v. Beto*, 460 F.2d 765, 768 (5th Cir. 1972); *Andrade v. Hauck*, 452 F.2d 1071, 1072 (5th Cir. 1971). In *Ruiz* we also held that prison officials were prohibited from "retaliation against inmates who complain of prison conditions or official misconduct." 679 F.2d at 1154. A guard thus may not harass an inmate in retaliation for the inmate complaining to supervisors about the guard's conduct.

Gibbs urges that the magistrate erred in dismissing his suit without making a finding on his harassment claim. Fed. R. Civ. P. 41(b) provides that upon motions to dismiss: "If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)." A motion under Rule 41(b) is not equivalent to a motion for a directed verdict, so the court must weigh the evidence and may consider witnesses' credibility. *Emerson Electric Co. v. Farmer*, 427 F.2d 1082, 1086 (5th Cir. 1970); Fed. R. Civ. P. 41 advisory committee note, 1946 amendment to subdivision (b). The district court must enter findings. *Weissinger v. United States*, 423 F.2d 795, 798 (5th Cir. 1970) (en banc), and its findings of fact are subject to review under the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). *Reimer v. Smith*, 663 F.2d 1316, 1321 (5th Cir. 1981); 9 C. Wright & A. Miller, Federal Practice & Procedure § 2376, at 248 (1971). Unclear or

incomplete findings may require reversal. *Emerson Electric*, 427 F.2d at 1086-88.

[8] We find that in this case the magistrate made findings sufficient to support his dismissal of Gibbs' harassment claim.[6] With respect to this claim, the court found that it was "exceedingly difficult to assign any significant degree of credibility to any of the testimony of Gibbs during this proceeding." Even though Gibbs may have been disciplined for violating an unposted policy, we do not believe that a single incident, involving a minor sanction, is sufficient to prove harassment. We do not believe, therefore, that the court's credibility determination was clearly erroneous.

Further, we find that the magistrate did not err in refusing to allow Gibbs to present evidence of another prisoner's complaints about harassment by prison guards. Even if Gibbs could have proved that Slan and Alexander had discriminated against another prisoner, this evidence, without a showing of pervasive harassment, would not have undermined the magistrate's finding that Gibbs was not a credible witness.

IV.

[9] Gibbs' final challenge is to the magistrate's refusal to issue a subpoena to appellant King. A district court's refusal to issue a subpoena is reviewable only for abuse of discretion. *Estep v. United States*, 251 F.2d 579, 582 (5th Cir. 1958). Gibbs has not shown that the magistrate abused his discretion. Gibbs had not stated why he needed King's testimony, except for indicating at trial that he wished to question King about past prosecutions under Rule 7. *Cf. United States v. Bowman*, 636 F.2d 1003, 1013 (5th Cir. 1981) (examining need for witness in criminal case). Gibbs did not need this testimony to challenge the rule on its face or to challenge his own disciplinaries. Thus the magistrate acted properly.

[6]Gibbs' claim that Secretary King and Norwood are liable to him in their supervisory capacities relates specifically to his claim that he was harassed by prison guards Slan and Alexander. There is no supervisory liability without primary liability. It was therefore proper for the magistrate to dismiss Gibbs' claim against King and Norwood.

V.

We **AFFIRM** in part and **REVERSE** in part and **REMAND** for proceedings not inconsistent with this opinion.

PRINTED FOR
ADMINISTRATIVE OFFICE — U.S. COURTS
BY ELECTROGRAPHIC CORP. — SAN FRANCISCO

The summary, which does not constitute a part of the opinion of the court, is copyrighted © 1985 by *Electrographic Corporation*, San Francisco.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 84-3232

D.C. Docket No. CA-82-0004-B

MAURICE GIBBS,

Plaintiff-Appellant,

versus

JOHN T. KING, Secretary,
Department of Corrections,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Louisiana

Before GARZA, POLITZ, and HILL, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

January 2, 1986

ISSUED AS MANDATE: JAN 24 1986

BEST AVAILABLE COPY

APPENDIX C

The Court:* This matter is before the Court on the defendant[s'] motion pursuant to Rule 41[(b)] of the Federal Rules of Civil Procedure for an involuntary dismissal at the conclusion of the plaintiff's case.

Under such a motion, the Court, as trier, of the facts, may determine the facts and render judgment against the plaintiff, or may decline to render any judgment until the close of all the evidence.

If the Court renders judgment on the merits against the plaintiff, the Court shall make findings, as provided in Rule 52[(a)] of the Federal Rules of Civil Procedure.

The following shall constitute the Court's findings of fact, and conclusions of law, as envisioned in Rules 41 and 52.

First, the law pertaining to actions of this type is set forth in a series of federal cases.

Our Supreme Court has articulated a policy of minimum intrusion by federal courts into the affairs of state prison administration. See Wolf[f] versus McDon[nell], 94 [S.Ct.] 2963; Bell v. Wolfish, 99 [S.Ct.] 1861.

This policy has been followed by the Fifth Circuit Court of Appeals. See Williams v. Edwards, 547 [F.2d] 1206, Fifth Circuit, 1977.

In reviewing a section 1983 complaint, the standard to be applied is whether or not actions of a disciplinary committee were arbitrary and capricious, or an abuse of discretion. Smith v. Rabalais, 659 [F.2d] 539, Fifth Circuit, 1981.

This case and others like it recognize the fact that federal courts cannot assume the task of retrying prison disciplinary disputes.

---

* Corrections of obvious transcription errors are indicated by brackets.

The evidence before the Court today exemplifies the wisdom behind such a policy.

No de [novo] hearing, or review, of the disciplinary board's finding is required; but this Court must consider whether at least the decision is supported by some facts, or whether any evidence at all supports the action taken by the prison officials.

In Wolf[f] versus McDon[nell], the Court acknowledged that although prison disciplinary proceedings do not require the full range of rights due a prisoner in a criminal proceeding, there are positive minimum requirements of due process which should be given prisoners.

This includes an opportunity to call witnesses, for example.

However, the right of confrontation and cross-examination and other such procedural due process rights are necessarily placed on a different footing in a prison disciplinary scheme than in a court of law due to the nature of a state prison.

The administration of a state prison requires broad discretion in the hands of prison officials.

This discretion must include the right to some extent to curtail the procedural due process rights available to a party in a court of law.

This court finds that the Louisiana State Penitentiary at Angola, Louisiana, and, in particular, Camp J thereof, is a maximum security prison administered by the State of Louisiana, and that the security requirements prevailing there necessarily indicate the need to empower prison officials with broad discretion.

It is against that general backdrop that the following factual determinations are made:

With respect to Count One of the Complaint, the Court finds that a disciplinary hearing was conducted first by review by Captain Butler, and then by a disciplinary board.

And that the discipline complained of was supported by the statement of the prison official — Alexander.

The defendant witnesses readily acknowledged under cross-examination that they afforded credibility to Alexander over the petitioner.

Such an acceptance and assignment of credibility does not constitute an abuse of their discretion, nor arbitrary and capricious exercise of that discretion.

This Court found it exceedingly difficult to assign any significant degree of credibility to any of the testimony of Mr. Gibbs during his proceeding.

And finds it reasonable under the circumstances of this case for the reviewers of the Alexander disciplinary report to have assigned a higher degree of credibility to him than to petitioner Gibbs.

The Court does not find that the petitioner has borne the burden of proof incumbent upon him with respect to the allegations set forth in his Petition, Count One.

Count Two is the complaint that Officer Butler, and then the disciplinary board did not reverse the disciplinary finding.

Complaining that neither of those proceedings were fair and meaningful.

The Court finds that Captain Butler at least gave consideration to the affidavit which was presented, and whether his reason for rejecting it was because it was not in a formally notarized form, or because in the words of Mr. Gibbs, he said it was nothing, given the circumstances of this case and the fact that it basically boiled down to a credibility determination between the prison official on the one hand and Mr. Gibbs and two inmates on the other, it would have been within his discretion to have received the affidavit, but rejected its assertions, which this Court finds is, in substance, what Captain Butler did.

To award Mr. Gibbs the relief sought in Count Two would be, essentially, for this Court to retry the disciplinary hearing[,] to accept Mr. Gibbs' sworn testimony over that of the defendant witnesses, and this Court is not in a position to do so.

In respect to Count Three, there was no evidence, nor does Count Three in its assertions amount to a constitutional deprivation within the meaning of Wolf[f] versus McDon[nell].

Count Four is the one which asserts the unconstitutionality of Rule Seven.

It was, and is, Mr. Gibbs' contention that the rule is unconstitutional[l]y vague when it speaks of unwarranted remarks and uncalled for remarks.

The rule as read into the record in its entirety clearly envisions discipline where a prisoner directs remarks and communications toward a penitentiary employee —

Mr. Penn [counsel for respondents], let me see a copy of the rule book, please.

(Perusing rule book.)

— that are either derogatory or degrading.

The rule reads, and I quote, "No prisoner shall make or write derogatory or degrading remarks about an employee.

"An employee shall not be subjected to insults, unwarranted and uncalled for remarks, or other clearly intrusive verbal behavior [wher] in the performance of their proper duties.

"Employee shall not be subject to unsolicited, non-threatening, abusive conversation, correspondence, or phone calls.

"Prisoners shall address employees by proper title, or by Mr., Ms., Miss, or Mrs., whichever is appropriate.

"No prisoner shall curse an employee in his absence."

That rule outlines a readily ascertainable standard. It, by its nature, cannot be much more precise than it is.

When a prison employee is about his official duties, he shall not be vilified, insulted, or the subject of other uncalled for, abusive, or threatening remarks.

This Court accepts as a practical impossibility defining such a rule to such an extent that an illustrative list of examples could be

prepared which would be of help and guidance to prison officials or inmates.

This is part of the discretion which must necessarily be afforded the administrators of the prison.

In Count Five of his Complaint, Mr. Gibbs alleges that all of the conduct previously complained of amounts to some sort of depr[i]vation of constitutional[l]y protected rights.

The Court doesn't find that any facts have been proved which supports such a count, nor does the Court find that any general equitable relief as prayed for in the Count entitled, "Equity" is called for.

In the only objective matters complained of by Mr. Gibbs and brought before this Court, there was objective evidence to support the actions of the defendants.

The Court does not find that there is any appropriate support for any of the five counts or the equity counts in the record.

For that reason, the lawsuit will be dismissed with prejudice.